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In The
Supreme Court of the United States
October Term, 1984

MAX M. WILSON AND HELEN M. WILSON,

Petitioners,

vs.

POGO PRODUCING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD RICCO
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

Counsel for Petitioners

Of Counsel:
PAUL A. COOTER

March 1, 1985

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QUESTION PRESENTED

In a diversity action based on breach of contract, may a federal court contravene clear state precedent on a controlling state law issue?

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No. _____

In The
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MAX M. WILSON AND HELEN M. WILSON,

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vs.

POGO PRODUCING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Max M. Wilson and Helen M. Wilson petition the United States Supreme Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this cause on November 5, 1984.

OPINIONS BELOW

The opinions of the court of appeals (App. 1) and the district court (App. 3) are not reported.

JURISDICTION

The judgment of the court of appeals (App. 1) was entered on November 5, 1984. A petition for rehearing was denied by order (App. 4) entered on December 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition involves consideration of 28 U.S.C. § 1652, the text of which is set forth below:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This action was instituted by Respondent Pogo Producing Company (hereinafter referred to as "Pogo") against Petitioners Max M. Wilson and his wife Helen M. Wilson (hereinafter referred to as "Wilsons") seeking specific performance and damages arising out of the alleged breach of a contract to assign an oil and gas lease. Jurisdiction in the federal district court was based on the diverse citizenship of the parties and an amount in controversy exceeding $10,000. 28 U.S.C. § 1332(a)(1).

The Wilsons denied the existence of a contract, relying for their defense on the statute of frauds. The evidence relevant to that defense was in material respects undisputed and showed the following.

The Wilsons acquired first priority to a certain federal oil and gas lease through a public drawing held by the Bureau of Land Management on October 21, 1980. Pogo desired an assignment of the lease from the Wilsons. Consequently, a representative of Pogo presented Max Wilson with a proposed "letter agreement" on January 19, 1981, offering to pay for assignment of the lease on certain stated terms. The proposal further provided:

> If the foregoing offer and conditions are acceptable, we ask that you and your wife indicate your acceptance by dating and executing one copy of this Letter in the spaces provided below and thereafter return same to Pogo or its representative. In the event Pogo has not received an executed copy of this Letter by 9:00 O'Clock A.M., January 20, 1981, this offer will immediately terminate and no longer be in force and effect.

Max Wilson did not sign the letter when it was presented to him on January 19, because he desired to consult with his attorney first. Wilson's questions about the proposed agreement could not be resolved by his attorney before the end of the day. Pogo's representative took the unsigned letter away with him, planning to return the following morning. There was no agreement between the Wilsons and Pogo that the 9:00 a.m. deadline for acceptance would not remain in force.

The Pogo representative returned to Mr. Wilson's office some time after 9:00 a.m. on January 20, 1981, and

Wilson signed the letter agreement around 9:30 a.m. on that date. At about 10:00 a.m., Helen Wilson also signed the agreement. Around the time Max Wilson signed the agreement, he and Pogo's representative discussed the fact that the 9:00 a.m. deadline had been missed. Their discussion occurred, however, only after the deadline had already passed, and no written notation extending the deadline was made at that time. Pogo subsequently prepared and sent to the Wilsons a writing which Pogo proposed should be executed by both parties, providing in substance that the missed deadline was of no consequence and that a valid contract existed. This writing was never signed either by the Wilsons or by Pogo.

The Wilsons moved for summary judgment on the ground that Pogo's offer expired by its terms at 9:00 a.m. on January 20 and that under the New Mexico statute of frauds, the offer could not create a binding contract without a writing extending the time for acceptance. Consequently, the Wilsons argued, they did not have a contract with Pogo.

Pogo also moved for summary judgment. On the cross-motions, the district court held that a contract existed between the parties. The district court subsequently awarded specific performance of the contract and $125,000 in punitive damages against the Wilsons. The court of appeals affirmed the judgment.

Neither the district court nor the court of appeals took cognizance of the line of New Mexico cases holding that a contract within the statute of frauds that has expired by its terms cannot be revived or extended by parol. By failing to follow clear and settled New Mexico law

supporting the Wilsons' defense, the court of appeals committed error.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit Contravened Clear and Settled New Mexico Law in Rejecting Petitioners' Statute of Frauds Defense.

Section 34 of the Federal Judiciary Act of 1789, 28 U.S.C. § 1652, requires federal courts to follow the applicable state substantive law where federal law is not controlling. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The purpose of the statute is "to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940).

This Court has granted certiorari in the past to correct a federal court that failed to apply state contract law in a diversity case. *See, e.g., Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180 (1940). Moreover, "there can be no doubt" that a state statute of frauds is one of the laws to be applied in such cases. *Moses v. National Bank of Lawrence County*, 149 U.S. 298, 303 (1893). Although the Petitioners make no claim that the statute of frauds issue presented by this case is itself of overreaching importance, it is essential to a balanced system of federalism that *Erie* continue to be followed. What is more, the impact of the Tenth Cir-

cuit's decision on the Petitioners is harsh. Because the Wilson/Pogo letter agreement was held enforceable, the Petitioners have been subjected not only to specific performance of the contract but also to punitive damages in the amount of $125,000. Where such a result is directly contrary to clear state law and follows only from Pogo's choice of a federal forum for this litigation, the consequent injustice calls out strongly for correction through a writ of certiorari.

Under New Mexico law, a contract involving the transfer of an interest in oil and gas property, such as the Wilson/Pogo contract involved in this case, is subject to the statute of frauds. *Fullerton v. Kaune,* 72 N.M. 201, 382 P.2d 529 (1963). The New Mexico Supreme Court has repeatedly stated that a contract within the statute of frauds, once it has expired by its terms, cannot be revived or extended by an oral agreement.

For instance, in *Pitek v. McGuire,* 51 N.M. 364, 184 P.2d 647 (1947), the New Mexico court discussed a hypothetical case involving a written employment contract that was orally renewed upon expiration of its one-year term. The court said:

> The assumed agreement stated as an illustration, had expired by its terms; and being within the statute of frauds, it could not be revived and extended by parol. No contract within the statute of frauds that has expired by its terms can be revived and extended by parol. Reason and authority are against it.

51 N.M. at 374, 184 P.2d at 653-54. Similarly, in *Mercury Gas & Oil Corp. v. Rincon Oil & Gas Corp.,* 79 N.M. 537, 540, 445 P.2d 958, 961 (1968), the court reiterated that "*parol* cannot revive or extend a contract if it has expired

prior to the alleged extension" (emphasis in original). *See also Gonzales v. United Southwest National Bank of Santa Fe,* 93 N.M. 522, 602 P.2d 619 (1979) (expired three-year employment contract could not be renewed for like term by oral exercise of option). *And see Adams v. Thompson,* 87 N.M. 113, 529 P.2d 1234 (Ct. App.), *cert. denied,* 87 N.M. 111, 529 P.2d 1232 (1974) (real estate brokerage contract could not be extended orally after its expiration).

The proper result in this case could not be clearer. The Wilson/Pogo letter agreement is unenforceable under the New Mexico statute of frauds. The Wilsons did not sign the agreement until after it had expired by its terms at 9:00 a.m. on January 20, 1981. There is no evidence that the parties said or did anything before that time that could of itself have extended the duration of Pogo's offer. At the time of expiration, Pogo's representative had not even returned to Max Wilson's office. Pogo and Wilson did not discuss the missed deadline until it had already passed. The agreement could only be made enforceable by a signed writing extending the time for the Wilsons to accept Pogo's offer. No such writing exists.

The Tenth Circuit should have arrived at this result by following the New Mexico authorities cited above. It failed to do so. Rather, the court took the view that the parties through their conduct waived the 9:00 a.m. deadline. The Tenth Circuit relied on two New Mexico cases, *Shaeffer v. Kelton,* 95 N.M. 182, 619 P.2d 1226 (1980), and *Ed Black's Chevrolet Center, Inc. v. Melichar,* 81 N.M. 602, 471 P.2d 172 (1970), recognizing that a party to an ongoing contract may waive a contractual right or condition of performance. Neither case, however, questions

or even addresses the rule that controls the case at bar. Neither case holds that an expired agreement within the statute of frauds may be revived by conduct without a writing.

By failing to follow directly applicable precedent, the Tenth Circuit contravened New Mexico law and ignored its duty under 28 U.S.C. § 1652 to apply the New Mexico statute of frauds in deciding this case. In so doing, the Tenth Circuit violated the principles of federalism and caused substantial harm to the Petitioners, who acted in reliance on the only law that could reasonably be expected to apply in these circumstances—that of the State of New Mexico.

———o———

CONCLUSION

For the reasons stated above, Petitioners' request for a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ EDWARD RICCO
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

Counsel for Petitioners

Of Counsel:

PAUL A. COOTER

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 82-2509 and 82-2581
(D.C. Civ. No. 81-239 JB)
(D. N.M.)

POGO PRODUCING COMPANY,

Plaintiff-Appellee,

v.

MAX M. WILSON and
HELEN M. WILSON, his wife,

Defendants-Appellants.

ORDER AND JUDGMENT

(Filed November 5, 1984)

Before DOYLE, McKAY, and McWILLIAMS,
Circuit Judges.

Pogo Producing Company, a Delaware corporation with its principal place of business in Texas and authorized to do business in New Mexico, brought suit in the United States District Court for the District of New Mexico against Max and Helen Wilson, husband and wife who are residents and citizens of New Mexico, for specific performance of a contract for the assignment of an oil and gas lease acquired by the Wilsons from the United States. Federal jurisdiction is based on diversity. 28 U.S.C. § 1332.

By answer, the Wilsons denied the existence of a valid contract, i.e., an assignment of the lease, and, by way

of counterclaim, sought damages for slander of title occasioned by the filing of a *lis pendens* by Pogo. Discovery ensued.

Pogo and the Wilsons then moved for summary judgment, both asserting, in effect, that there was no genuine issue of material fact relating to the question as to whether there was a valid contract between the parties, Pogo contending, of course, that there was a valid contract and the Wilsons contending that there was no valid contract between the parties. The district court denied the Wilsons' motion for summary judgment and granted the motion of Pogo. Having held that there was a valid contract between the parties, the district court dismissed the Wilsons' counterclaim based on slander of title.

As indicated, Pogo sought specific performance, and also sought special damages in the sum of $120,000 and punitive damages in the sum of $5,000,000. The damage phase of the case was thereafter tried to the court. By its final judgment, the district court decreed specific performance, declined to award Pogo anything as special damages, and awarded it $125,000 as punitive damages.

The Wilsons, on appeal, raise two issues: 1) the district court erred in concluding that there was a valid contract between the parties; 2) the district court erred in awarding punitive damages. Pogo, by cross appeal, asserts error by the district court in refusing to award it the special damages it sought.

Limited recital of the undisputed facts will put this controversy in focus. In a public drawing held by the Bureau of Land Management, the Wilsons acquired first

priority for a federal oil and gas lease on certain acreage in Lea County, New Mexico. Pogo sought assignment of the lease to be acquired by the Wilsons. On January 19, 1981, Pogo prepared and submitted a written "letter agreement" to the Wilsons wherein Pogo offered to purchase the lease for a cash consideration of $480,000, and further to reserve to the Wilsons a three percent overriding royalty interest. The offer was conditioned upon the Wilsons receiving the lease from the BLM within two years, the actual assignment of the lease from the Wilsons to Pogo, and the BLM's approval of the assignment. A further condition was that the Wilsons accept, execute, and return the letter agreement to Pogo or one of its representatives prior to 9:00 a.m. on the following day, i.e., January 20, 1981. In this regard, the letter agreement also provided that if Pogo did not receive an executed copy of the letter agreement by 9:00 a.m. on January 20, 1981, the offer would terminate.

Mr. Wilson had indicated to a Mr. Carlton, Pogo's representative in this transaction, that he wanted to confer with his attorney before signing the letter agreement, and in the late afternoon on January 19, 1981, Wilson advised Carlton that it was doubtful he could have his lawyer check out certain matters in time to meet the 9:00 a.m. deadline on the following day. Carlton apparently indicated that this slight delay would be all right. In any event, Carlton, Pogo's agent, was in Mr. Wilson's office around 9:00 a.m. on the 20th and Wilson affixed his signature to the letter agreement around 9:30 a.m. on that date. Carlton and Mr. Wilson then took the letter agreement to the Wilson family home where Mrs. Wilson affixed her signature at about 10:00 a.m. on the 20th.

Carlton and Mr. Wilson had some discussion regarding the fact that the 9:00 a.m. deadline had been missed, and neither indicated that such was of any consequence. Carlton, however, later prepared a writing which he sent to Mr. Wilson to the effect that the parties agreed that there was a timely delivery. This memorandum was never signed by the parties.

Pogo, thereafter and in reliance on the signed letter agreement, took steps in preparation for its drilling project and also attempted to expedite the actual issuance of the lease by BLM to the Wilsons. The lease was issued by BLM to the Wilsons on March 19, 1981. Pogo then asked that the Wilsons assign the lease to it in accord with the letter agreement between the parties. The Wilsons refused and for the first time advised Pogo that there was no agreement between the parties because of the failure to meet the 9:00 a.m. deadline. On March 30, 1981, Pogo brought the present suit. The Wilsons later agreed to assign the lease here in question to Getty Oil for $960,000, plus an override.

As stated, both Pogo and the Wilsons moved for summary judgment on the issue of liability, Pogo arguing that there was a valid agreement between the parties and the Wilsons arguing that there was no agreement. The district court held that there was a valid agreement between Pogo and the Wilsons, and that Pogo had waived the condition that the Wilsons had to execute and deliver the signed letter agreement by 9:00 a.m. on January 20, 1981. In so doing, we do not believe the district court either misunderstood or misapplied the local contract law of the State of New Mexico. *See* Schaeffer v. Kelton, 95

N.M. 182, 619 P.2d 1226 (1980) ("It is an established rule that the waiver of an express contractual condition may be implied in the conduct of the parties."); Ed Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 471 P.2d 172 (1970).

As concerns the punitive damage award made by the district court, the Wilsons concede that under New Mexico law punitive damages may be awarded in a breach of contract action but only if the breach be the result of malice or reckless or wanton conduct. *See* State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974). Here, according to the Wilsons, there was no malice or reckless conduct on their part, and that, on the contrary, their actions were based on advice from their lawyer. However, the fact that one acts on the advice of his lawyer is not necessarily a complete shield to the charge of malice or reckless conduct. Nueces Trust Co. v. White, 564 S.W. 2d 798 (Tex. Civ. App. 1978); Perkins v. Stephens, 131 Mont. 138, 308 P.2d 620 (1957). Reliance on an attorney's advise[sic] may be considered as a factor which would reduce the amount of punitive damages. *Id.* However, "the advice of counsel that the defendant had the right to do the act complained of will not protect him from exemplary damages if it is done in a wanton and offensive manner, and in fact maliciously." Nueces Trust, 564 S.W. 2d at 806, quoting 25 C.J.S. Damages § 123(7) (1966).

In the instant case, the district court found that the defendants were knowledgeable in the oil and gas leasing business, and that they knowingly and willfully breached their agreement with Pogo in order to obtain a much more favorable agreement with Getty Oil Company. This is a finding of fact and the record permits such an inference.

Such being the case, we are not at liberty to disturb the district court's finding unless it be clearly erroneous, which, in our view, it is not. Fed. R. Civ. P. 52(a). Upon making such a finding, the district court was justified in awarding punitive damages.

By cross-appeal, Pogo asserts that the district court erred in not awarding it special damages. In this connection the district court concluded that Pogo had failed to establish that the expense which it had incurred was caused by Wilsons' breach of the letter agreement. We regard this to be a fact issue, and we are not prepared to label the district court's finding in this regard as clearly erroneous.

Judgment affirmed in its entirety.

/s/ Howard K. Phillips, Clerk

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 81-239-JB

POGO PRODUCING COMPANY,

Plaintiff,

v.

MAX M. WILSON and
HELEN M. WILSON, his wife,

Defendants.

COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW
(Filed November 12, 1982)

THIS MATTER having come on for a hearing on the merits on October 14, 1982, and the parties hereto having submitted their respective requested findings of fact and conclusions of law, and the Court being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff is a foreign corporation duly authorized to transact business in the State of New Mexico with its office and principal place of business in the State of Texas; Defendants are residents of the State of New Mexico; and the matter in controversy exceeds the sum of $10,000, exclusive of interests and costs.

2. This Court previously entered its summary judgment by Memorandum Opinion and Order, filed January 4, 1982, which determined, *inter alia,* that:

a. Defendants acquired a first priority for the issuance of a Bureau of Land Management oil lease in Eddy County, New Mexico, at a drawing held on October 21, 1980.

b. Defendants executed a valid contract on January 20, 1981, by which they agreed to convey to Plaintiff Federal Oil and Gas Lease NM 42814 covering the east one-half of Section 31, Township 21 South, Range 32 East, NMPM.

c. At all times, Plaintiff stood ready, willing and able to perform its obligations under the contract.

d. Defendants breached the contract and are liable to Plaintiff for the breach.

3. Because the contract involved the conveyance of an interest in real property, and particularly mineral properties, there is no adequate remedy of law for the breach thereof.

4. Notwithstanding the contract of January 20, 1981, Defendants entered a second contract, dated April 20, 1981, with Getty Oil Company, under which Defendants agreed to convey to Getty Oil Company the Oil and Gas Lease NM 42814 for a total consideration of $960,000 with a reservation in Defendants of a 1/16th of 8/8ths overriding royalty interest.

5. The contract of April 20, 1981, with Getty Oil Company was knowingly and willfully entered into by Defendants.

6. At the time the contract of Defendants with Plaintiff, dated January 20, 1981, was executed by the parties, Plaintiff was the owner of Federal Oil and Gas Lease NM 10599, encompassing 1,984.99 acres of land, more or less; a portion of the lease was the southwest one-quarter of Section 31, Township 21 South, Range 32 East, NMPM.

7. The Federal Oil and Gas Lease NM 10599 was to expire on October 31, 1981, unless production was secured on the lease by October 31, 1981, or unless the lease was otherwise extended pursuant to federal regulations by utilization or other means.

8. The contract between Plaintiff and Defendants, dated January 20, 1981, took into account and acknowledged that the issuance of the Oil and Gas Lease NM 42814 by the Bureau of Land Management was to issue within two years from the date of the agreement.

9. In order to preserve Federal Oil and Gas Lease NM 10599, Plaintiff elected to form a federal unit for the expiring lease by reentering on June, 1981, the well on Section 26 which had been started on October 31, 1979, but later abandoned; and this drilling was concluded in November, 1981.

10. The well drilled in Section 26 extended the Federal Oil and Gas Lease NM 10599 until July 23, 1983.

11. Defendants are sophisticated in the oil and gas industry in that Defendant Max M. Wilson's principal occupational endeavor is in the oil and gas business.

12. Since the contract, dated January 20, 1981, contemplated that the lease from the Bureau of Land Management might not issue for at least two years from the date

of the assignment, Plaintiff was aware that the lease might not issue in time for Plaintiff to extend Federal Oil and Gas Lease NM 10599 beyond the expiration date of October 31, 1981.

13. Plaintiff was not entitled to rely on the Federal Oil and Gas Lease NM 42814 in order to extend the expiration date of Federal Oil and Gas Lease NM 10599.

14. At the time the contract of January 20, 1981, was executed by the parties, Plaintiff did not have enough information in its possession to justify proration in Section 31.

15. As late as April 1981, Plaintiff was uncertain whether it would form a unit with the south one-half of Section 31.

16. Plaintiff could not communitize the southwest one-half of Section 31.

17. A well site for prorating the west one-half of Section 31 was prepared by Plaintiff.

18. Plaintiff knew it could not communitize the east one-half unit of Section 31.

19. Plaintiff is entitled to specific performance of the contract dated January 20, 1981.

20. Defendants having knowingly and willfully breached the contract with Plaintiff in order to gain a more favorable contract with Getty Oil Company for the assignment of Federal Oil and Gas Lease NM 42814, Plaintiffs are entitled to punitive damages.

21. The expenses of forming the new unit, designated as the "Green Unit," to preserve the Federal Oil and Gas

Lease NM 10599 were unrelated to, and did not proximately result from, Defendants' breach of the contract with Plaintiff, dated January 20, 1981.

22. The expenses of reentering and drilling the well in Section 26 were unrelated to, and did not proximately result from, Defendants' breach of the contract with Plaintiff, dated January 20, 1981.

23. The expenses incurred by Plaintiff with regard to "Max Federal No. 1" and to "CLN Federal No. 1," both in Section 31, were not related to, and did not proximately result from, Defendants' breach of the contract with Plaintiff, dated January 20, 1981.

Conclusions of Law

1. This Court has jurisdiction over the subject matter, and the parties to, this action.

2. Plaintiff is entitled to specific performance of the contract dated June 20, 1981.

3. Plaintiff is entitled to recover from Defendants the sum of $125,000 as punitive damages.

/s/ Juan G. Burciaga
United States District Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 81-239-JB

POGO PRODUCING COMPANY,

Plaintiff,

v.

MAX M. WILSON and
HELEN M. WILSON,

Defendants.

MEMORANDUM OPINION AND ORDER
(Filed January 4, 1982)

THIS MATTER comes before the Court on cross-motions for summary judgment. The plaintiff, Pogo Producing Company (hereinafter Pogo), seeks specific performance on a purported contract for the sale of lease rights on real property. The defendants, Max and Helen Wilson, have denied that there is a valid contract, and have counterclaimed for slander of title. For the reasons set forth below, the Court finds Pogo's motion for summary judgment to be well taken in part and it is hereby granted as to the issue of the defendants' liability under the contract. Accordingly, the defendants' motion for summary judgment is denied. Additionally, summary judgment will be granted in plaintiff's favor on the counterclaim alleged by the defendants.

The Bureau of Land Management (hereinafter BLM) held a drawing for offers to lease land held by BLM in

Eddy County, New Mexico. Defendants Wilson entered an offer and were fortunate enough to acquire first priority for the issuance of an oil and gas lease at the drawing held on October 21, 1980.

Some time thereafter, Pogo and the Wilsons began negotiating a purchase by Pogo of the lease which was to be issued to the Wilsons. Eventually, Pogo made a written offer to the Wilsons which was dated January 19, 1981. The offer contained the essential terms of the alleged agreement and provided that if an executed copy of the agreement was not delivered to Pogo by 9:00 a.m. on January 20, 1981, the offer would be terminated.

In fact, the offer was not accepted before the deadline. Instead, some thirty to sixty minutes after the deadline, Mr. Wilson signed the offer in the presence of agents of Pogo, who then took the document to Mrs. Wilson for her signature. Mrs. Wilson signed the agreement approximately sixty minutes after the deadline.

When Mr. Wilson signed the offer, Pogo's agents suggested that a notation be made on the letter indicating that the deadline for acceptance had been waived. Mr. Wilson believed that to be unnecessary. Still, Pogo delivered to Wilson's attorney a written document waiving the time limitation. However, this document was never signed by any of the parties.

After the Wilsons signed the offer, Pogo took a number of steps to expedite the issuance of the lease to the Wilsons by BLM. Pogo also purchased abstracts and prepared closing documents on the assumption that the Wilsons would honor the agreement. Pogo even forestalled

development of adjoining lands in reliance on the written agreement.

The oil and gas lease was issued to the Wilsons on March 19, 1981. Pogo demanded that the defendants assign the lease to it pursuant to the alleged agreement. The defendants refused and have continued to do so. Pogo has at all times been ready to perform its obligations under the agreement.

Suit was filed on March 30, 1981. The first amended complaint, filed on May 26, 1981, states causes of action for breach of contract, misrepresentation and "bad faith." Pogo seeks specific performance, or alternatively compensatory and punitive damages. The Wilsons have counterclaimed for slander of title, and raise the affirmative defense of the Statute of Frauds as well as denying the existence of a legal contract. Jurisdiction is proper under 28 U.S.C. § 1332 (1976).

Pogo has moved for summary judgment seeking a decree of specific performance. In the alternative, Pogo seeks summary judgment on the issue of liability under the breach of contract and misrepresentation counts. Pogo also seeks summary judgment in its favor on the defendants' counterclaim. The defendants have moved for summary judgment on all of the counts against them.

I. *Liability under the Contract*

Pogo asserts that there is a valid contract for the purchase and sale of the lease rights acquired by the Wilsons from BLM. Since the contract is for the sale of an interest in real property, argues Pogo, specific performance should be granted. *See,* 71 Am.Jur.2d, *Specific Perform-*

ance § 112 (1973); 81 C.J.S., *Specific Performance* § 76 (1977); Restatement (Second), *Contracts 2d* § 360, Comment e (1981); Dobbs, *Remedies* § 12.10 (1973). The defendants argue that there is no contract. They assert that when the Wilsons signed the agreement, the agreement was binding only on the Wilsons and not Pogo. Since there was no mutuality of obligation, the argument goes, there is no binding contract. The Court finds that the record clearly shows that the purported contract was valid.

The defendants' argument has a fatal flaw. It assumes that Pogo would not have been bound by the agreement. However, the facts agreed to by the parties clearly show that Pogo waived the deadline contained in its written offer. Moreover, even if there was no waiver, it is manifest that on these facts, Pogo would be estopped from denying the validity of the agreement. It is clear that Pogo would have been bound by the contract. The argument of the defendants is therefore without merit.

As the plaintiff correctly points out, there are a number of ways to characterize the series of events involved in this case. Regardless of the characterizations chosen, however, it is clear that the contract is valid. The Court finds that Pogo waived its right to enforce the deadline for acceptance. Therefore, when the Wilsons signed the written offer, they accepted the offer and a binding contract came into existence.

Waiver is the voluntary and intentional relinquishment of a known right or privilege. *Ed Black's Chevrolet Center, Inc. v. Melichar*, 81 N.M. 602, 471 P.2d 172 (1970). A finding of waiver may be based on words or conduct.

Cooper v. Albuquerque City Commission, 85 N.M. 786, 518 P.2d 275 (1974). It is obvious that Pogo knew of the acceptance deadline and its right to enforce that deadline. When Pogo's agents pursued Mr. Wilson after the deadline has [sic] passed, and took steps to obtain the signature of the defendants, Pogo relinquished its right to enforce the deadline. This relinquishment was both voluntary and intentional. Since the deadline was waived, the original offer remained open at the time the defendants signed the document. Their signing of the document constituted acceptance of the offer. There being a valid offer and an equally valid acceptance, it is clear that the contract is valid. *McCoy v. Alsup*, 94 N.M. 255, 609 P.2d 337 (Ct. App. 1980).

The same result can be reached even if there was no waiver. If there was no waiver, then the original offer was revoked as of the passing of the deadline. However, when Pogo's agents pursued the Wilsons after that time, they were in effect making a new offer. Once the new offer was accepted, Pogo and the Wilsons were bound by the terms of the offer. S. Williston, *Law of Contracts* § 93 at 117 1 (1961).

Finally, the Court finds that the defendants are estopped from asserting the alleged invalidity of the contract. Equitable estoppel arises when a party has been induced by another, through words or conduct, to do or forbear from doing something he or she would have done but for such words or conduct, where the party asserting estoppel has relied on that conduct to his or her detriment. *Capo v. Century Life Insurance Company*, 94 N.M. 373, 610 P.2d 1202 (1980); *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 494 P.2d 962 (1972). In this case, the Wil-

sons have, both by words and conduct, induced Pogo to do acts it would not have done otherwise. By signing the offer and then representing to Pogo that the agreement was considered valid, the Wilsons induced Pogo to do things it would not have otherwise done. Pogo did a number of things in preparation for its drilling project. and took a number of steps to expedite the issuance of the lease to the Wilsons by BLM. It is clear that but for the Wilsons' conduct, Pogo would not have done these things. These actions by Pogo also constitute the change of position or detriment necessary for estoppel to lie. *See, State Farm Mutual Auto Insurance Co. v. Gonzales,* 83 N.M. 296, 491 P.2d 513 (1971); *C & H Construction and Paving Company, Inc. v. Citizens Bank,* 93 N.M. 150, 597 P.2d 1190 (Ct. App. 1979). Therefore, the defendants are estopped from denying the validity of the contract.

The defendants have also interposed the affirmative defense of failure to comply with the Statute of Frauds, as there is no writing evidencing the contract. This defense is without merit. A writing need not be in the form of a formal contract to satisfy the Statute. *Pitek v. McGuire,* 51 N.M. 364, 184 P.2d 647 (1947). A written offer can be sufficient to satisfy the Statute so long as it is signed by the party against whom it is charged. *Kiersey v. Hirsch,* 58 N.M. 18, 205 P.2d 346 (1954). The written offer signed by the Wilsons contained all of the essential terms of the agreement, including the names of the parties, the price to be paid by Pogo, and a description of the land which was the subject matter of the agreement. *See, Kiersey v. Hirsch,* supra. Therefore, it is clear that the Statute of Frauds is no barrier to liability under the

contract. The cases relied upon by the defendants are clearly inapposite.

From the foregoing, it is clear that there is a valid contract and that the defendants have breached it. Because the contract is for the sale of a lease interest in real property, specific performance may be appropriate. However, specific performance is an equitable remedy, and its granting is therefore within the discretion of the Court. The plaintiff has alleged two other claims in addition to the specific performance count. Until these matters are resolved, the Court believes that it cannot properly balance the equities between the parties. Since the equities cannot yet be weighed, the Court will not grant the discretionary remedy of specific performance at this time. The Court does hold, however, that the agreement between the parties is valid, and that the defendants are liable for breaching that agreement.

II. *Slander of Title Claim*

The slander of title claim brought by the defendants must be dismissed. The defendants claim that by filing a notice of lis pendens on the land in question, Pogo has committed slander of title. Pursuant to this Court's ruling that Pogo's claim to the property is a valid one, it is clear that no slander has been commited. Therefore, the Court will and hereby does grant Pogo's motion for summary judgment as to this claim.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's motion for summary judgment is granted as to the issues of the validity of the contract and the defendants' liability thereunder;

2. That the plaintiff's motion for summary judgment is granted as to the defendants' counterclaim;

3. That the plaintiff's motion for summary judgment is denied as to all other matters; and

4. That the defendants' motion for summary judgment is denied as to all matters raised therein.

DATED this 5th day of January, 1982.

/s/ Juan G. Burciaga
United States District Judge

APPENDIX 4

NOVEMBER TERM—December 10, 1984

Before Honorable William e. [sic] Doyle, Honorable Monroe G. McKay, and Honorable Robert H. McWilliams, Circuit Judges

Nos. 82-2509 and 82-2581

POGO PRODUCING COMPANY,

Plaintiff-Appellee/
Cross-Appellant,

v.

MAX M. WILSON and HELEN M. WILSON,

Defendants-Appellants/
Cross-Appellees.

This matter comes on for consideration of appellants'/cross-appellees' motion for extension of time to file petition for rehearing, and the petition for rehearing in the captioned cause.

Upon consideration whereof:

1. The motion for extension of time to file the petition for rehearing is granted to November 21, 1984.

2. The petition for rehearing is denied.

/s/ Howard K. Phillips
Clerk

Office Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1390

In The
Supreme Court of the United States
October Term, 1984

MAX M. WILSON AND HELEN M. WILSON,
Petitioners,

vs.

POGO PRODUCING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

HAROLD L. HENSLEY
HINKLE, COX, EATON,
COFFIELD & HENSLEY
P.O. Box 10
Roswell, New Mexico 88201
Telephone: (505) 622-6510
Counsel for Respondent

March 28, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Supreme Court should grant a writ of certiorari to review the Tenth Circuit Court of Appeals' affirmance of a United States District Court decision which properly and correctly applied state law precedent on a controlling state law issue?

LIST OF RELATED COMPANIES

Pogo Producing Company has no parent company and all of its subsidiaries are wholly owned. It is not affiliated with any other company.

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vs.

POGO PRODUCING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Pogo Producing Company presents this brief in response to Petitioners' Petition for Writ of Certiorari, requesting the United States Supreme Court to deny review of this case.

REASONS WHY THE WRIT SHOULD BE DENIED

Both the Tenth Circuit and the United States District Court for the District of New Mexico Properly and Correctly Applied Settled New Mexico Law in Rejecting Petitioners' Statute of Frauds Defense. The Application of this Law by both Courts Correctly followed the Rules of Decision Act (28 U.S.C. § 1652) on which Petitioners base their claim for review.

A. Application of State Law

Respondent Pogo Producing Company (Pogo) certainly agrees with the proposition that both 28 U.S.C. § 1652 and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) require a federal court to apply state law on a contract question in this diversity case. Petitioners have attempted to cast this case as one in which the federal courts below failed to follow state precedent. By setting forth the case in this way, Petitioners have attempted to create a significant federal issue for this Court to consider. However, the fatal defect in their position is that both the District Court and the Tenth Circuit correctly applied state law in reaching their decisions. Petitioners' arguments for review are themselves based upon propositions which are not the law in New Mexico, or in any other state.

B. Application of Statute of Frauds

The statement of the case set forth in Petitioners' Petition is substantially correct. It shows that the statute of frauds did not prevent the enforcement of the contract at issue, and in fact was entirely satisfied. The essential facts can be briefly summarized. Petitioners, the Wilsons,

owned the right to a federal oil and gas lease. On January 19, 1981, a representative of Pogo presented the Wilsons with a proposal to pay for an assignment of the lease on certain terms. The proposal letter stated that it would expire if Pogo did not receive an executed copy by 9 o'clock the next morning. Mr. Wilson desired to consult with his attorney before signing the agreement, but was unable to secure advice that day. The parties met the next day, shortly after the 9 o'clock deadline, discussed the agreement and the Wilsons then signed the agreement. The District Court found that under these facts Pogo had waived the deadline contained in its offer and the Wilsons then accepted the offer. As the Court stated:

> Since the deadline was waived, the original *offer* remained open at the time the defendants signed the document. Their signing of the document *constituted acceptance of the offer*. There being a valid offer and an equally valid acceptance, it is clear that the contract is valid.

(Opinion of the District Court, Reprinted in the Petition at App. 16, emphasis added.) The District Court further found that the same result could be reached even without a waiver, on the theory that the original offer was revoked when the deadline passed, and a new offer was made when Pogo's agents again sought to consummate the agreement. As a third and alternate ground, the District Court found that the Wilsons were estopped to deny the validity of the agreement by their "signing the offer and then representing to Pogo that the agreement was considered valid" thus inducing Pogo to act in reliance on the agreement. Thus, the District Court found three alternative grounds supporting its conclusion.

The Tenth Circuit affirmed the District Court on the grounds that its application of local contract law of the State of New Mexico was correct. The Tenth Circuit noted that New Mexico law recognizes the waiver of an express contractual condition from the conduct of the parties. Thus, both the district and appellate courts considering the issue reached the same conclusion, that the statute of frauds was inapplicable to prevent the enforcement of this contract.

Petitioners cite several cases for their argument that no enforceable contract was reached. However, each of these cases is inapposite because they do not controvert the basic principle upon which the validity of this contract rests. That principle is that the statute of frauds does not require that an *offer* be in any particular form, only that contracts concerning certain subjects be evidenced by a writing. The letter agreement proposal which contained the deadline in this case, at the time the "change" was made, was not an "agreement" as the Petitioners have attempted to characterize it, rather it was an offer. It could not be an "agreement" because it was unilaterally presented to the Wilsons for their consideration and acceptance. Before the Wilsons took any action, it did not create any rights other than a power of acceptance in the Wilsons.

In each case cited by the Petitioners, no writing in fact supported the contract claim. In *Pitek v. McGuire*, 51 N.M. 364, 184 P.2d 647 (1947), the New Mexico Supreme Court discussed the hypothetical case where a written employment contract was orally renewed upon expiration of its one year term. The Court stated that because the agreement was within the statute of frauds, it could not be extended by parol evidence. The Court's statement,

which Petitioners quote in their Petition, is that "[n]o *contract* within the statute of frauds that has expired by its terms can be revived and extended by parol." *Pitek*, 51 N.M. at 374, 184 P.2d at 653 (emphasis added). No New Mexico case, nor any general law regarding the statute of frauds, requires that an offer be in writing or prevents a written offer from being extended orally. As the District Court found as one of its alternate grounds, it may be said that although the written offer expired, an oral offer on the same terms was subsequently made and accepted by the Wilsons.

The other cases cited by Petitioners, *Mercury Gas and Oil Corp. v. Rincon Oil and Gas Corp.*, 79 N.M. 537, 445 P.2d 958 (1968), *Gonzales v. United Southwest National Bank of Santa Fe*, 93 N.M. 522, 602 P.2d 619 (1979) and *Adams v. Thompson*, 87 N.M. 113, 529 P.2d 1234 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974) all deal with the invalidity of oral extensions after the offer had been accepted and the written contract had expired by its own terms. Because these contracts (as opposed to offers) had expired by their terms, there was no writing evidencing the alleged obligation at the time enforcement was sought. In none of these cases did the Court hold that a written offer which had expired by its terms could not be revived by parol or conduct of the parties. Unlike the time limitations in the cases cited by Petitioners, the time limitation in the present case was on acceptance of the offer, not on the performance under the contract.

Contrary to Petitioners' free use of the terms, an "offer" is not an "agreement", and the statute of frauds does not require an offer to be in writing. It is succinctly stated by Professor Williston:

> Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the terms of his offer. Any such manifestation of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.

1 H. Jaeger, *Williston on Contracts,* § 53 at 171 (3d Ed. 1957). No New Mexico case controverts this basic principle.

Pitek sets forth the elements of a writing necessary to satisfy the statute of frauds in New Mexico. *Pitek* states that:

> To satisfy the statute of frauds the contract itself must be in writing; or if verbal, then there must have been some writing subsequently made however informal, stating each of its essential elements, signed by the person to be charged, or by his authorized agent acting for him.
>
> The essentials of such contracts have been stated as follows:
>
> "A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) Each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods, or other subject matter to which the contract relates, and (c) the terms and conditions of all the promises constituing the contract and by whom and to whom the promises are made."

Pitek, 51 N.M. at 371, 184 P.2d at 651-52, *quoting* Restatement, Contracts, Sec. 207. Petitioners have made no claim that the contract in this case did not contain the essential elements. Instead, they claim the time limitation expressed in the offer rendered the contract unenforceable. Under the circumstances, the time limitation contained in the offer was irrelevant, because the writing contained sufficient information to satisfy the statute of frauds. The time limitation on the offer was surplusage and irrelevant to the substantive portions of the agreement which satisfied the statute of frauds. "The statute of frauds only requires that there be written evidence to prove that the particular contract was made." *Jennings v. Ruidoso Racing Assoc., Inc.*, 79 N.M. 144, 441 P.2d 42 (1968).

Petitioners are further attempting to use the statute of frauds to perpetrate just what it is intended to prevent. Their statute of frauds defense is raised in order to perpetrate a fraud upon Pogo. The evidence was uncontroverted that the Petitioners signed the agreement after the deadline and in no way represented that they considered it invalid. Unless they intended their signatures to be a nullity and for some reason lead Respondent astray, they must have intended to accept the terms of the contract embodied in the letter from Respondent. To allow the Petitioners to now avoid their agreement would be to allow them to use the statute of frauds as an instrument of fraud. The universal rule is that this will not be allowed. *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 69 N.M. 281, 365 P.2d 925 (1961). The statute of frauds is not intended as an escape route for persons seeking to avoid obligations which they have undertaken. *Keirsey v. Hirsch*, 58 N.M. 18, 265 P.2d 346 (1953).

Petitioners state that "the impact of the Tenth Circuit's decision on the Petitioners is harsh. . . . Petitioners have been subjected not only to specific performance of the contract but also to punitive damages in the amount of $125,000.00." (Petition at 5-6). Pogo would state that the effect of this decision is appropriately harsh on Petitioners because their conduct warranted the imposition of these damages. The facts were uncontroverted that Petitioners were aware of the deadline stated in the offer, knowingly disregarded it and signed the agreement after the deadline passed. Further, Petitioners never raised the purported invalidity of the contract until after they had knowingly allowed Respondent to spend significant sums and time in reliance on the contract and then only after Petitioners had accepted an offer for double the amount which Pogo had paid for the lease right. Under these circumstances, the District Court found that the Petitioners knowingly and willfully breached the contract in order to obtain a more favorable contract. Thus, the harsh result imposed upon Petitioners is the direct result of their conduct towards Pogo. They have no right to be relieved of these penalties where they are the direct result of conduct which clearly warranted the imposition of punitive damages.

No New Mexico rule of law requires an offer to be in writing, nor does any rule prevent an oral or implied extension of a written offer which has expired by its terms. The statute of frauds requires only some memorandum indicating the essential terms of the agreement and signed by the parties. That statute of frauds requirement was clearly met here. The Petitioners willingly signed the memorandum, knowing that the written expiration time

had passed, and gave every indication that they intended to enter a binding contract. Both the Tenth Circuit and the District Court correctly applied New Mexico law to find that the statute of frauds did not prevent the enforcement of this contract and could not be used as a vehicle for the Petitioners to avoid the obligation they had willingly entered into. Because two federal courts correctly applied state law, no issue of federalism is raised in this case and it does not warrant consideration by this Court.

CONCLUSION

For the reasons stated above, Petitioners' request for a writ of certiorari to review the decision below should be denied.

Respectfully submitted,

By: /s/ Harold L. Hensley
Hinkle, Cox, Eaton,
Coffield & Hensley
P.O. Box 10
Roswell, New Mexico 88201
Telephone: (505) 622-6510

Counsel for Respondent